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No. 75-480

In the

Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL EDUCATIONAL ADVERTISING SERVICES, INC.,

Petitioner,

vs.

CASS STUDENT ADVERTISING, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, National Educational Advertising Services, Inc. ("NEAS"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on May 23, 1975.

OPINION BELOW

The opinion of the Court of Appeals, Slip Op. No. 74-1518 (7th Cir., May 23, 1975); 1975-1 Trade Cases ¶60,331, appears in Appendix A. The opinion of the District Court for the Northern District of Illinois, reported at 374 F. Supp. 796 (N.D. Ill., 1974), appears in Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 23, 1975 (Appendix C). A

timely petition for rehearing and rehearing *en banc* was denied on July 8, 1975 (Appendix D). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is petitioner's business, which is the representation of college newspapers for the solicitation of national advertising, a proper relevant product market under the Sherman Act?

2. Can representing college newspapers in soliciting the placement of national advertising be a relevant market under the Sherman Act when college newspaper advertising is not?

3. Is the existence of distinct customers alone a sufficient basis for finding a relevant market or submarket?

4. Was the determination of the District Court that petitioner's business did not constitute a relevant market under the Sherman Act, a determination of fact which should not have been overruled by the Court of Appeals unless found to be "clearly erroneous" under Rule 52(a) of the Federal Rules of Civil Procedure?

STATUTES INVOLVED

These proceedings involve sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2) and Rule 52(a) of the Federal Rules of Civil Procedure. These provisions are set forth in Appendix E.

STATEMENT OF THE CASE

For approximately forty years, petitioner and its predecessors have represented college newspapers in the placement of national advertising. An advertising representative, like both petitioner and respondent, seeks to obtain advertising for media which it represents. The advertising representative is different from an advertising agency which, on behalf of an advertiser, prepares the advertisement and purchases space or time for it in the media, frequently through an advertising representative.

The advertising representative, whetner for college newspapers, metropolitan dailies or broadcast media, works on an exclusive basis on behalf of its client to obtain advertising for it. Much time and effort is spent in persuading the advertiser to purchase space or time from the medium. The mechanics of processing the advertising were described by the District Court (Appendix B, p. 3b, Footnote 1). The advertising representative is paid a commission by the medium based on the dollar value of the advertisement which is placed. The work of all advertising representatives is fundamentally the same. This holds true whether their principals are magazines, television stations, metropolitan dailies, neighborhood weeklies or college newspapers. They find advertisers for the media they represent, receiving a commission based on the dollar value of the advertisements placed. There was uncontroverted testimony cited by the District Court that Mr. Hanson, petitioner's president, was "doing the same thing selling space in college newspapers as [he] was [when he was working] on the Ladies' Home Journal as an advertising salesman." Appendix B, p. 11b.

Petitioner primarily represents college newspapers in the field of national advertising. College newspapers generally carry local advertising, such as that of a particular store in a local community, and frequently carry national advertising, such as advertising for Kodak cameras. In college newspapers carrying both local and national advertising, most advertising is local advertising.

There is no evidence that any college newspaper carries solely national advertising. National advertising in college newspapers is either solicited by a newspaper representative from an advertiser or an advertiser's agency or is placed directly by an advertiser or an advertiser's agency. Frequently, national advertising is also placed in college newspapers directly by local distributors of nationally advertised goods and services.

Petitioner has exclusive contracts with approximately 900 college newspapers. These contracts provide for representation as a newspaper representative by petitioner and are renewable annually to coincide with the school year and the annual publication by petitioner of its rate book for college newspaper advertising. These contracts do not prohibit college newspapers from obtaining national advertising directly from the advertiser or its agency or from a local distributor of the advertiser's product. Petitioner has non-exclusive agreements or understandings with approximately 210 other college newspapers.

Founded forty years ago originally as an independent company, petitioner was owned and operated as a division of Readers Digest Sales and Service, Inc., from March 1966 to December 1970. It was purchased by its present owners in December of 1970 at which time its liabilities exceeded its assets. Petitioner's gross revenues (i.e. commissions) were $613,118 in its 1973 fiscal year and its earnings after taxes that year were $14,800. At the end of its 1973 fiscal year (two months before this suit was filed) petitioner's net worth was $66,544.

Respondent began its business activities in 1969 as a newspaper advertising representative of both high school and college newspapers in the Chicago area for local advertising. All were on an exclusive basis. Respondent's ex-

clusive contracts with these newspapers are in most cases identical to petitioner's exclusive contracts. Respondent later expanded its activities to include student newspapers throughout the country for both local and national advertising. At the time of the trial approximately 18% of Respondent's revenues were derived from national advertising placement.

In October, 1973 respondent filed suit against petitioner in the United States District Court for the Northern District of Illinois, alleging that petitioner had violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2). Jurisdiction was based on Sections 4, 12 and 16 of the Clayton Act (15 U.S.C. §§15, 22 and 26). In its complaint, respondent described the relevant market, which it alleged that petitioner had monopolized or attempted to monopolize, as "the market for representing college newspapers throughout the United States in the placement of national advertising." Appendix A, p. 14a.

Respondent filed a motion for a preliminary injunction. Following extensive discovery, a three-day hearing was held in December, 1973 before Judge Bernard M. Decker. During the hearing petitioner presented a substantial quantity of evidence that college students are subjected to advertising from numerous sources. These sources include not only daily newspapers, national magazines, and commercial radio and television, but also specialized media such as the college editions of *Newsweek* and *Time*, student radio stations, "youth-appeal" magazines, and leafletting. Appendix B, pp. 9b, 10b.

At the conclusion of the hearing, on Judge Decker's suggestion and as provided by Rule 65(a)(2), the parties agreed that the evidence then before the court would be

considered the evidence in a final hearing, and the parties submitted the case for a final decision on the merits, based upon that evidence.

On April 15, 1974 the District Court issued its judgment and opinion dismissing the complaint, entering judgment for petitioner. The District Court held that respondent had failed to demonstrate by a preponderance of evidence that the market alleged in the complaint, namely, the market for representing college newspapers throughout the United States in the placement of national advertising, constituted a relevant market under the Sherman Act. Appendix B, p. 14b.

The District Court's decision was based upon its findings that college newspaper advertising is in direct and real competition with a multitude of other forms of advertising, and that both petitioner and respondent are "in very real rivalry with other publications and media and their representatives for all or part of the national advertising dollars directed toward the college market." Appendix B, p. 14b.

On appeal, the Court of Appeals reversed. Emphasizing petitioner's and respondent's positions as "middlemen in a dual market" between college newspapers and national advertisers, the Court of Appeals accepted respondent's market definition. In reaching this conclusion, the court stated that it deemed it unnecessary to set aside the District Court's findings of fact under the "clearly erroneous" standard in Rule 52(a) of the Federal Rules of Civil Procedure. Appendix A, p. 2a.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Establishes A Standard Of Unprecedented Narrowness In The Definition Of A Relevant Market Under The Sherman Act.

The District Court held that the representation of college newspapers for national advertising did not constitute a relevant market. In its words, the District Court concluded:

> "Economic and commercial realities do not support the conclusion that the market for representing college newspapers for the placement of national advertising is a 'separate, identifiable market' . . . or submarket." Appendix B, p. ~~13b.~~ 14b.

The District Court found that college newspaper advertising competes directly with other advertising to college students, and that the skills and business techniques involved in representing college newspapers are the same as in representing other media. Appendix B, pp. 9b, 10b.

All advertising representatives perform basically similar functions. It is common for an advertising representative to have as clients media which share a common readership either through geographical location or interest grouping. For example, an advertising representative may represent a group of technical publications or special interest publications such as automotive magazines. Under the Court of Appeals' ruling, each such representative would be engaged in a distinct relevant market, even though the advertising in the media represented competed with other advertising and even though the representative performed services identical to those of any other representative. The Court's decision, if allowed to stand, would mean that any seller of fungible services would be vulnerable to attack under the anti-

trust laws if only its customers were distinguishable in some way. The Court of Appeals has unfortunately fallen victim to the temptation warned against by Justice Fortas, that of tailoring the relevant market to the dimensions of the defendant's business. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 590 (1966) (Fortas, J., dissent)

The Court of Appeals' analysis is too theoretical for the realities of the Sherman Act. The court's refined reasoning ignores the impractical results that would follow from its unrealistically narrow market definition. College newspapers are of minor economic consequence when compared to a number of other media directed to college students. Such media commonly employ advertising representatives on an exclusive basis to solicit advertising. Anyone who succeeds in that business must cope, in dealing with national advertisers, with the vast media available to advertisers and, in dealing with the media, with the very real competition of other means of obtaining advertising revenue. The Court of Appeals' decision will make a monopolist or oligopolist of every successful advertising solicitor.

The realities ignored by the Court of Appeals are that the position of an advertising solicitor for any media, whether thought of as a "classic middleman" or not, is too weak and insecure to be characterized as a market with antitrust significance. The forces of the national advertisers on one side and of the media on the other are too strong economically to permit an intervening relevant market between them. The Court of Appeals, in considering that the service of representing college

newspapers is itself a relevant market has delineated, not a market or submarket, but a business segment that, standing alone, lacks any antitrust significance.

According to the Court of Appeals, the middleman's relevant market under Section 2 of the Sherman Act is his business. The only task in defining his relevant market comes in locating his business. For the Court of Appeals this is simply a matter of finding the purchasers of the middleman's services (Appendix A, pp. 12a-13a). Discussing in turn "ultimate purchasers" and technical purchasers, the court settles on the actual purchasers.* In the case of petitioner these are college newspapers (Appendix A, p. 14a). Having once determined the middleman's actual customers, the court then determines what services the middleman performs for them. This gives the court the middleman's relevant market. Petitioner provides college newspapers with national advertising; thus petitioner's relevant market is selling national advertising to college newspapers. By this reasoning the Court of Appeals will always find a middleman's business and his relevant market co-extensive. Clearly, the court has ignored the warning not to tailor the relevant market to the dimensions of the defendant's business.

The Court of Appeals' reasoning is greatly at odds with the thought of this Court. The relevant market for middlemen's services must be defined by the reasonable interchangeability of use or the cross-elasticity of demand between the middleman's service and the substitutes for it. In *United States* v. *E.I. duPont de Nemours & Co.*,

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* The Court of Appeals indicates that a middleman could be monopolizing more than one relevant market if more than one group actually purchases his services. Appendix A, p. 13a.

351 U.S. 377, 395 (1955), this Court ruled that a relevant market is comprised of "commodities reasonably interchangeable by consumers for the same purposes." Applying this test the Court found the broader market of flexible packaging materials, rather than the narrower cellophane market to be the relevant market.

The Court of Appeals failed to consider either reasonable interchangeability or cross-elasticity of demand in defining the middleman's or advertising representative's market. Following *duPont* the boundaries of a middleman's relevant market are defined by first describing the cluster of services he sells and then looking for the reasonable substitutes of these services. The Court of Appeals goes no further than the first step when defining "middlemen markets". Skipping any consideration of reasonable interchangeability, the Court of Appeals instead applies, contrary to the evidence, to the middleman's business the submarket indicia set forth in *Brown Shoe Company* v. *United States,* 370 U.S. 294 (1966). The Court of Appeals found petitioner's business a submarket. It would find every middleman's business to be a submarket. In short the Court of Appeals finds submarkets without looking for the broader market itself.

Interchangeability is just as vital a consideration in defining submarkets as in defining broader markets. As this Court stated in *United States* v. *Phillipsburg National Bank,* 399 U.S. 350, 360 (1970) "submarkets are not a basis for disregard of a broader line of commerce that has economic significance." It has also warned that relevant markets must be drawn "with sufficient breadth to include the competing products of each of the [parties] and to recognize competition where, in fact, competition exists." *Brown Shoe Company* v. *United States,* 370 U.S.

294, 325 (1966). Heeding this cautionary language, the Court in *United States* v. *Greater Buffalo Press,* 402 U.S. 549, 553 (1971), found the relevant market to be the broader market urged by the defendants. Instead of the two submarkets found by the District Court—printing color comic supplements for newspapers without printing facilities and printing color comic supplements for syndicates—this Court found the printing and sale of color comic supplements the relevant market. The Court said "the printing of color comics is the same no matter for whom it is done or through whom they are distributed." To paraphrase, the work of an advertising representative is the same no matter for which advertiser, local or national, it is done or through which media the advertising is communicated.

Petitioner respectfully submits that if the unrealistically restrictive analysis of the Court of Appeals below is widely adopted, the result will be a geometric increase in the number of antitrust cases coming to the courts.

II. Petitioner's Business, Representing Sellers Of Advertising Space In College Newspapers To National Advertisers, Cannot Be A Relevant Market When College Newspaper Advertising Itself Is Not.

The business of both petitioner and respondent as it relates to the sale of college newspaper advertising space to national advertisers is similar to that of a manufacturers' representative. After examination of the evidence, the District Court held that college newspaper advertising itself could not be deemed a relevant market because it was interchangeable with other forms of advertising. This finding was not reversed by the Court of Appeals, which simply held that the representation of college newspapers for national advertising was cognizable as a relevant

market capable of being monopolized under the Sherman Act.

In effect, the Court of Appeals has held that representing the seller of a product may constitute a relevant market even though the production and sale of that product do not. The business of being a middleman with respect to advertising space in college newspapers has now been held to be a relevant market, even though under the District Court's finding national advertising in college newspapers cannot be deemed a relevant market since it faces sufficient competition from other advertising. The result of the Court of Appeals' decision is that it is now possible for there to exist a submarket cognizable under the antitrust laws which is confined totally within an economic area which itself cannot be deemed a relevant market or even a submarket.

In reversing the District Court, the Court of Appeals emphasized the "distinctness" of college newspapers. Appendix A, p. 8a. However, the Court of Appeals erred in concentrating on the college newspapers themselves rather than the products of those newspapers (*i.e.*, advertising space) which petitioner places. While college newspapers may be distinct as media because they serve specialized communities and are primarily staffed by students, the District Court found that advertising space in those newspapers is interchangeable with advertising space or time in other media. The Court of Appeals did not disturb this finding. Carried to its logical conclusion, then, the Court of Appeals' opinion would mean that one firm could control all advertising space in college newspapers without being a monopolist because college newspaper advertising is interchangeable with other advertising. However, the lesser activity of representing the

college papers in the sale of that newspaper space to national advertisers is, according to the Court, a relevant market exposing the representative to liability as a monopolist under the Sherman Act. Thus, a part is greater than the whole. This anomalous result of the Court of Appeals' analysis is certain to create confusion in the delineation of relevant markets under the Sherman Act.

In economic theory, petitioner and respondent may be, as the Court of Appeals described them, "classic middlemen" (Appendix A, p. 11a). But it does not follow that the middleman is a separate market or submarket between the buyer and the seller under the Sherman Act. The District Court treated the middleman more realistically as an integral segment of the college newspaper advertising market.

In separating petitioner from its principal and holding that each is engaged in a distinct relevant market, the Court of Appeals treats a soliciting agent for many principals as a market all by himself so that he becomes a monopolist under the Sherman Act. No decision of this or any other court has made such a specific holding nor pointed to such a result by dicta. The Court of Appeals' opinion discusses the question against the background of many decisions of this Court and of the Seventh Circuit Court of Appeals. But the general standards or principles stated in other cases do not support the result reached.

If the Court of Appeals' analysis is upheld not only will almost all advertising representatives be subject to charges of monopolization, but most manufacturers' representatives will also be subject to attack, regardless of their size and whether or not the product involved

could be considered a relevant product market under the Sherman Act.

III. The Court Of Appeals' Opinion Conflicts With Relevant Market Analyses Of Other Courts Of Appeals.

The decision of the Court of Appeals below conflicts with recent decisions of Courts of Appeal for other circuits.

The court in *Telex Corp.* v. *International Business Machines Corp.*, 510 F.2d 894, 918 (10th Cir., 1974), criticized the definition of a relevant market in unrealistically narrow terms and cited with approval the approach adopted by the court in *Advance Business Systems & Supply Co.* v. *SCM Corp.*, 287 F. Supp. 143 (D.C. Md., 1968). In that case the court held that the sale of coated paper for use in SCM machines was unrealistically narrow and that the appropriate market should be the sale of coated paper for use in SCM and other machines using the direct electrostatic process.

In the *SCM* case there was evidence that SCM's papers had distinct characteristics which made it more suitable in some ways, though not all, for use in SCM machines, but also evidence that other paper could be used.

In *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F. 2d 547 (1st Cir., 1974), the plaintiff argued that the relevant market was limited to public swimming pool pipeless recirculation systems, not the entire market for public swimming pool recirculation systems. The court rejected this narrow delineation, despite evidence that pipeless systems saved excavation and maintenance costs, permitted greater design flexibility and outlasted conventional systems two to three times. (508 F. 2d at 553).

In *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir., 1975), Finley contended that the relevant market was the supplying of concession services at major league baseball games. The Court of Appeals disagreed and remanded the case to the District Court for further proceedings to determine the scope of the relevant market. While leaving the actual delineation of the market to the District Court, the Court of Appeals strongly suggested that the market defined by the District Court was too narrow. (512 F. 2d at 1271-2).

In *Acme Precision Products, Inc.* v. *American Alloys Corp.*, 484 F. 2d 1237 (8th Cir., 1973), the Court of Appeals found that the proof was insufficient to establish the line of commerce alleged. The plaintiff had tried to prove that a certain high strength aluminum alloy constituted a relevant market. The District Court found that there were no effective substitutes for this alloy, citing the fact that governmental specifications called only for it. The Court of Appeals, quoting at length from this Court's decision in the *Cellophane Case* held that the primary inquiry was whether there was reasonable interchangeability of use. (484 F. 2d at 1241). The Court stated:

> "Thus, as in *duPont*, buyers may prefer cellophane because of its alleged superior qualities over some other flexible wrapper and be willing to pay a higher price. Yet this does not itself place cellophane in a separate market. The 'end use' of a product has a greater influence on the determination of 'cross-elasticity' than the higher price of a more desirable product." (484 F. 2d at 1244).

Similarly here, while college newspaper advertising is an effective advertising medium, the advertiser has numerous alternatives to reach college students and is not required to use any college newspaper advertising representative. Likewise, the college newspaper has ready alternatives to using the services of any advertising representative. These alternatives include direct placement by the advertiser or its agency or by a local distributor.

In *ALW, Inc.* v. *United Air Lines, Inc.*, 510 F. 2d 52 (9th Cir., 1975) the Court of Appeals for the Ninth Circuit rejected an attempt by the plaintiff, the owner of a hotel in Reno, Nevada to describe a line of commerce which was co-extensive with advertising in United Air Lines' *Mainliner* magazine, although the court noted that only United provided a direct service from the eastern United States to Reno, the plaintiff's place of business, and although the selectivity of advertising in such a medium would give it a considerable advantage over other forms of advertising.

In *Seeburg Corp.* v. *FTC*, 425 F. 2d 124, 129 (6th Cir., 1970), the Sixth Circuit Court of Appeals rejected the contention that there was a submarket of the bottle vending machine market consisting solely of supplies to Coca-Cola bottlers. The Court noted that the submarket contended for satisfied only one of the criteria established in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962), that of distinct customers. Likewise in this case, the only submarket criterion found to exist by the District Court were distinct customers. Since the Court of Appeals here defined the relevant market based on the finding of the District Court as to distinct customers, the Court of Appeals

decision below is in direct conflict with that of the court in *Seeburg*.

IV. The Court of Appeals Misapplied Rule 52(a) of the Federal Rules of Civil Procedure in Considering the Guides for Determining a Relevant Market under the Brown Shoe Case.

The Court of Appeals described its determination as one of law on the ground that the District Court had "misapplied the appropriate legal standards". But the Court of Appeals actually set aside the District Court's findings of fact as to the relevant market in violation of the provisions of Rule 52(a) that findings of fact should not be set aside "unless clearly erroneous" and that "due regard shall be given to the opportunity of the trial ~~trial~~ court to judge of the credibility of the witnesses." This is shown by the different treatment accorded by the two courts to each of the guides established by this Court in *Brown Shoe*•.

In determining whether the relevant market is the mere representation of college newspapers in soliciting national

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• *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962): "The outer boundaries of a product market are determined by the (1) reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist. . . . The boundaries of such a submarket may be determined by examining such practical indicia as (2) industry or public recognition of the submarket as a separate economic entity, (3) the product's peculiar characteristics and uses, (4) unique production facilities, (5) distinct customers, (6) distinct prices, (7) sensitivity to price changes, and (8) specialized vendors" (enumeration added).

advertising, the primary factual question is whether there was reasonable interchangeability of the petitioner's service in such representation, which in turn involves the substitutes for the service. The Court of Appeals overlooks this necessary factual basis for its holding and there are no District Court findings which could support its holding. The trial judge's opinion to the contrary contains only a clear finding that the testimony "established that the function performed by advertising representatives for commercial daily newspapers are 'interchangeable' with the operations of representatives for other media" (Appendix B, pp. 10b, 11b). The District Court called attention to the testimony of Mr. Hanson (petitioner's president) that, when selling space in college newspapers, his work was the same as when he acted as an advertising salesman for The Ladies Home Journal (Appendix B, p. 11b).

It is generally held that not all of the indicia need be present for a proposed submarket to be considered a "line of commerce". *United States* v. *American Technical Industries, Inc.*, 1974-1 Trade Cases ¶74,873 at p. 95,871 (N.D. Pa., 1974). Judge Decker found the existence of only one of the indicia, distinct customers. Petitioner submits that the mere existence of distinct customers is not sufficient to constitute an economically meaningful market or submarket.

Moreover, the Court of Appeals' opinion differs from that of the District Court with respect to their findings under the *Brown Shoe* submarket criteria, as follows:

1. Industry Recognition:

   a) The District Court found there was recognition by advertisers of college students as a market for goods and services but did not find there was industry recognition of the representation of college newspaper advertising. The District Court also found the industry considered college newspapers to be in competition with other media. Appendix B, pp. 8b, 9b. Finally the District Court concluded that "from the viewpoint of the industries involved, the national advertisers and the school papers, plaintiff's [respondent's] alleged market is not a relevant market or submarket". Appendix B, p. 10b.

   b) The Court of Appeals stated, contrary to the evidence and despite the finding by the District Court, that the advertising industry recognized the representation of college newspapers as a separate and distinct business. Appendix A, p. 15a.

2. The product's peculiar characteristics and uses:

   a) The District Court said "no evidence was presented to differentiate the parties' business from those enterprises which attempt to sell advertising space in other . . . media." Appendix B, p. 10b.

   b) The Court of Appeals was silent on this question.

3. Unique production facilities:

   There was no evidence that any unique production facilities are involved, and neither court made any finding on this question.

4. Distinct customers:

   The District Court found, and the Court of Appeals agreed, that college newspapers constitute a distinct

communications medium. Appendix B, p. 8b; Appendix A, p. 8a.

5. Distinct prices:

There was no evidence and no findings were made on this matter.

6. Sensitivity to price changes:

a) The District Court mentioned testimony by plaintiff's expert that *national advertising in college papers* (not petitioner's services) *may* be price-inelastic, but stopped short of a finding on this question. Appendix B, p. 11b.

b) The Court of Appeals agreed and added that petitioner's services "*may* be price-inelastic" (italics added). Appendix A, p. 15a.

7. Specialized vendors:

a) The District Court found that "neither Cass nor NEAS can be deemed a 'specialized vendor', performing specialized functions." Appendix B, p. 11b.

b) The Court of Appeals found that they were specialized vendors and stated that the District Court also found that they were specialized vendors, despite the specific finding of the District Court to the contrary. Appendix A, pp. 14a, 15a.

The Court of Appeals' definition of the relevant market was thus reached by a process of factual determination, thereby usurping the province of the District Court. This Court has held that a Court of Appeals can only reverse

findings of fact where it finds them "clearly erroneous". *Zenith Corp.* v. *Hazeltine*, 395 U.S. 100, 108 (1968); *United States* v. *E. I. duPont deNemours & Co.*, 351 U.S. 377, 381 (1956). Moreover, the definition of a relevant market is, in itself, an inherently factual question and should not be disturbed on appeal unless found to be "clearly erroneous". *E.g., International Boxing Club of New York, Inc.* v. *United States*, 358 U.S. 242, 244-5 (1958). Other Circuits have adhered to this rule, the Tenth Circuit recently saying in *Telex Corp.* v. *International Business Machines Corp., supra*:

> "We recognize that market definition is generally treated as a matter of fact and that findings on this subject are not to be overturned unless clearly erroneous." (510 F. 2d at 915)

The efficient administration of justice demands that the findings of the trier of fact not be overturned unless found to be clearly erroneous. The precedent established by the Court of Appeals below would give Courts of Appeals an unrestrained hand in substituting their findings for those of the District Court, at least on relevant market determinations.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to review the decision below.

Respectfully submitted,

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APPENDIX A

OPINION OF THE COURT OF APPEALS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 74-1518

CASS STUDENT ADVERTISING, INCORPORATED,
Plaintiff-Appellant,

vs.

NATIONAL EDUCATIONAL ADVERTISING SERVICE, INCORPORATED,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 73 C 2779
BERNARD M. DECKER, *Judge.*

ARGUED JANUARY 15, 1975 — DECIDED MAY 23, 1975

Before CLARK, *Associate Justice (Retired)*,* CUMMINGS and TONE, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This appeal is from the dismissal of a treble damage suit by Cass Student Advertising, Inc. ("Cass") against National Educational Advertising Services, Inc. ("NEAS") alleging violations of Sections 1 and 2 of the Sherman Act (18 U.S.C. §§ 1 and 2).

Count I of the complaint asserted that NEAS exercised monopoly power in the relevant market in violation of Section 2 of the Sherman Act. The relevant

* Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

market was defined as "the market for representing college newspapers throughout the United States in the placement of national advertising."

Count II charged that NEAS attempted to monopolize that market, also in violation of Section 2 of the Sherman Act.

Count III asserted that NEAS' agreements with college newspapers designating it as their exclusive agent were contracts in restraint of trade in violation of Section 1 of the Sherman Act. Count III also alleged that NEAS conspired with many college newspapers to restrain trade in plaintiff's business and prevented it from competing with defendant in the previously defined market.

In each count, plaintiff sought a judgment that defendant violated the Sherman Act, injunctive relief, treble damages, costs and attorneys' fees.

In a memorandum opinion reported in 374 F.Supp. 796 (N.D. Ill. 1974), the district court held that the relevant line of commerce was not "the market for representing college newspapers for the placement of national advertising" but embraced other publications and media and their representatives. Thus the court determined that the relevant market included "all modes of competition used to present national advertising to college students." Since Cass was said to have offered no evidence to show NEAS' possession of monopoly power in that market, the district court concluded that NEAS had not violated the antitrust laws. 374 F.Supp. at 803. We reverse because of our disagreement with respect to the relevant market.

The evidence submitted below is largely uncontroverted. We deem it unnecessary to set aside the district court's findings of fact under the "clearly erroneous" standard embodied in Rule 52(a) of the Federal Rules of Civil Procedure. However, in concluding that the relevant market included all modes of competition used

to present national advertising to college students, with all deference, the district court misapplied the appropriate legal standards, thus compelling reversal. See *United States* v. *Connecticut National Bank,* 418 U.S. 656, 666; *Mullis* v. *Arco Petroleum Corp.,* 502 F.2d 290, 296-297 (7th Cir. 1974);[1] *Bendix Corp.* v. *Balax, Inc.,* 471 F.2d 149, 161 (7th Cir. 1972), certiorari denied, 414 U.S. 819; *American Aloe Corp.* v. *Aloe Creme Laboratories, Inc.,* 420 F.2d 1248 (7th Cir. 1970), certiorari denied, 398 U.S. 929.

In this area, the classic principles were adumbrated in *United States* v. *E. I. Du Pont de Nemours & Co.,* 351 U.S. 377, the so-called Cellophane case, and *Brown Shoe Co.* v. *United States,* 370 U.S. 294. In the former, the Supreme Court laid down the "reasonable" interchangeability" test for ascertaining a relevant market for commodities. In *Brown Shoe,* this test was refined by recognizing that submarkets may exist whose boundaries

> "may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and speicalized vendors." 370 U.S. at 325.

In *Du Pont* and *Brown Shoe,* relatively expansive markets were found to be appropriate. However, subsequent Supreme Court cases have recognized the propriety of narrower markets depending on the facts of the individual case. Thus in *United States* v. *Grinnell Corp.,* 384 U.S. 563, defendants unsuccessfully wanted protective services other than those of the central station variety to be included in the market definition. In rejecting that position, the Court observed:

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[1] In *Mullis,* the trial judge failed to define any relevant market. On appeal, plaintiff's suggestion of what was the appropriate market was rejected by this Court.

> "What defendants overlook is that the high degree of differentiation between central station protection and the other forms means that for many customers, only central station protection will do. Though some customers may be willing to accept higher insurance rates in favor of cheaper forms of protection, others will not be willing or able to risk serious interruption to their businesses, even though covered by insurance, and will thus be unwilling to consider anything but central station protection." 384 U.S. at 574.

Similarly, in *International Boxing Club, Inc.* v. *United States,* 358 U.S. 242, the Court held that the relevant market was the promotion of championship boxing contests in contrast to all professional boxing events, despite the claimed physical identity of the products involved. One of the reasons supporting this conclusion was testimony of representatives of the various media that there was a special demand for the rights to broadcast, telecast and film championship contests as compared to non-championship contests. 358 U.S. at 252.

The most recent Supreme Court consideration of a relevant market occurred in *United States* v. *The Connecticut National Bank,* 418 U.S. 656. There the district court had concluded that both savings and commercial banks were in the same product market for Clayton Act purposes. While acknowledging that savings banks and commercial banks in Connecticut are fierce competitors as to certain services, a unanimous Court concluded that the business of commercial banking was sufficiently distinct from other credit institutions to warrant separate treatment.[2] Commercial banking was held to be a distinct line of commerce even though there was a large measure of similarility between the services provided by savings banks and commercial banks in Connecticut.

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[2] In Part II of the opinion, dealing with the determination of the relevant geographic market, the Justices were split 5 to 4.

Our own decisions also uphold submarkets in appropriate cases. Thus in *L. G. Balfour Co.* v. *Federal Trade Commission,* 442 F.2d 1, 11 (7th Cir. 1971), we rejected an argument that the suppliers of all emblematic jewelry, rather than fraternity products, should be included in the product market, stating that any market definition "which ignores the buyers [here the college newspapers] and focuses on what the sellers do, or theoretically can do, is not meaningful."[3]

Similarly, in *Avnet, Inc.* v. *Federal Trade Commission,* .... F.2d .... (7th Cir. No. 73-1399, 2/28/75, slip opinion at 13-17), involving manufacturers of parts which are sold to rebuilders of automotive electrical units, we held that the relevant market should exclude sales of used and rebuilt parts because they were sold 25% or 50% below comparable new items, with no substantial interaction in price between the two lines. We also excluded sales to custom rebuilders because they and production-line rebuilders "perform different functions and operate at significantly different levels of distribution within the overall market * * *" (slip opinion at 14).

The teaching of these cases leads us to conclude that the district court erred in its perception of the service offered by defendant and thus erroneously determined the relevant market. Concededly, college students are exposed to national advertising in various media, but the critical question is whether the service of representing college newspapers in the placement of national advertising is a line of commerce or submarket within the scope of the antitrust laws. The district court never properly addressed this issue; therefore, we reverse and remand.

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[3] This quotation in the *Balfour* opinion originated in *United States* v. *Bethlehem Steel Corp.,* 168 F.Supp. 576, 592 (S.D. N.Y. 1958).

I. *The District Court's Findings*

A. *Description of the Business*

Both parties support the district court's description of their business in the opinion below. 374 F.Supp. at 797-798. Briefly, the description is as follows:

> "The plaintiff and the defendant are both engaged in the business of representing college newspapers for the placement of national advertising. So far as the evidence indicates, the parties are, in effect, the only serious contenders in this field. The operation of this business can best be viewed as comprised of two aspects.
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> "At the first stage, the company seeking to establish itself in the business solicits college newspapers to receive authorization to represent them to national advertisers. Because of a lack of staff, financial and other resources with which to solicit national advertisers on their own, most college newspapers which run national advertisements accept the services of a representative.
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> "Upon acceptance by a newspaper, the second aspect of the representative's operation comes into play—the representative becomes an advertising space salesman for the college papers. • • • [T]he representative solicits national advertisers, either directly or through their agencies, in an attempt to sell them on the college newspaper medium, or, at least the papers it represents, as a viable mode of publicizing their products or services." 374 F.2d at 797.

Eventually, the advertiser receives one bill from the representative covering the total amount due the various college newspapers with which its advertising has been placed.

B. *The Parties*

As the district court found, in 1970, Cass, whose principal place of business is in Chicago, decided to broaden

its then primary business of representing, for local advertising only, various Chicago area college and high school newspapers by becoming a representative of college newspapers throughout the country for the placement of national advertising. Cass claims that of $3,000,000 annual billings for national advertising in college newspapers, Cass received only $50,000 during its fiscal year ending August 31, 1973, allegedly because of NEAS' monopolistic position and practices, including its exclusive agreements with hundreds of college newspapers. 374 F.Supp. at 798.

NEAS has its principal place of business in New York City. Its corporate predecessor was the only business which represented college newspapers in the placement of national advertising for 40 years. In March 1966, the predecessor was purchased by Readers Digest Sales and Service, Inc. and was operated as a division under the NEAS name. The four present individual owners of NEAS purchased it from Readers Digest on December 1, 1970, at a time when its liabilities exceeded its assets. No cash changed hands when the business was transferred from Readers Digest to the present owners, who assumed a portion of the liabilities.

At the time of the hearing below, NEAS had about 894 written contracts with college newspapers designating NEAS as their exclusive representative.[4] NEAS also had about eight non-exclusive written agreements with college newspapers and about 203 non-exclusive oral understandings with them. Its 1973-1974 directory claimed that NEAS represents 1,070 college newspapers with a circulation of 7,163,734, covering "84.3% of the current

[4] These contracts are executed on a form supplied by NEAS and are exclusive only as to other representatives of college newspapers. Thus the contract does not preclude the newspapers from accepting advertising directly from the national advertiser or its agency.

8,500,000 college market."[5] The district court found that almost all the college newspapers at the hundred schools with largest student enrollment, representing about one-third of all college students, have exclusive arrangements with NEAS. 374 F.Supp. at 799.

C. *District Court's View of the Relevant Market*

The parties agreed that the geographic market is nationwide. Both presented testimony that *college students, who constitute one-third of the 18-24 age group, comprise a distinct market* for goods and services. As to the college student group, the court found:

> "They have substantially different interests, and, in many cases, live in different environments and have different life styles from their noncollegiate peers. Generally, the students have a broader and more critical range of tastes and will spend more than people their age who are not in school." 374 F.Supp. at 801.

It was also undisputed that *college newspapers constitute a distinct communications medium*. Apparently a higher percentage of college students read their college newspapers than any other publication with the possible exception of local commercial newspapers, which may reach as many college students. NEAS claims that college newspapers are the most reliable and effective medium to reach the college market. 374 F.Supp. at 801.

Having thus recognized the special nature of the individual consumer market that college newspapers effectively reach, the court examined the nature of the service involved in this case and the relevant market for that service. The court's view of the crucial issues in the case can be gleaned from the following passages from its opinion:

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[5] As the district court noted, there is evidence in the record that indicates that the NEAS overestimated the "college market" and that it actually represents newspapers reaching 87% of college students.

> "The critical dispute concerns the service or product market. Thus, the question is whether the business of representing college newspapers for the placement of national advertising is a type of service that constitutes a relevant market such that domination thereof makes out a 'part' of commerce within the meaning of the Sherman Act.
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> *"This case involves a single service—publicizing a national advertiser's product or service to the college market.* And the evidence indicates that, in this effort, college newspapers are in direct competition with a number of other communication methods.
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> "The attitude of national advertisers toward college newspapers vis-a-vis other advertising media was illustrated by the testimony of Mr. Philip Murtaugh, a long-time employee of a national advertising agency." (Emphasis added, 374 F.Supp. at 800-801.)

The court's reason for being concerned with the attitude of national advertisers is made clear in a footnote to the last sentence quoted above, footnote 9:

> "9. The attitudes of the national companies on this issue must be examined, for, as the Seventh Circuit has noted, 'any test "which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful."' L. G. Balfour Co. v. F.T.C., *supra* at 11, quoting United States v. Bethlehem Steel Corp., 168 F.Supp. 576 (S.D.N.Y. 1958). *At this stage of the analysis, the buyers are the national advertisers;* they are purchasing the advertising space offered by the college papers." (Emphasis added, 374 F.Supp. at 801.)

The court noted that although the advertising industry considers college newspapers to be a separate avenue of communication, it also considers them to be in competition with a number of other communication methods in bringing national advertising to college students, such

as television, radio, commercial newspapers, magazines, billboards, direct mail advertisements, posters, student directory advertisements and advertising samples. However, the district court did acknowledge, as plaintiff's expert witness had testified, that certain national advertisers' use of college newspapers may be price-inelastic. 374 F.Supp. at 802.

Finally, the district court set forth its definition of the relevant market in the conclusion of its opinion, noting that Cass and NEAS

> "are in very real rivalry with other publications and media and their representatives for all or part of the national advertising dollars directed toward the college market.
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> "[T]he court has determined that the relevant market must be defined to embrace all modes of competition used to present national advertising to college students. Since no evidence was offered to show defendant's possession of monopoly power in that market, there is no basis upon which the court can reasonably conclude that defendant has violated the antitrust laws." (Footnote omitted, 374 F.Supp. at 803.)

II. *The Dual Nature of Defendant's Service and the Relevant Market*

In our view, the district court's incorrect definition of the relevant markt was an inevitable result of its misunderstanding of the dual nature of the service offered by Cass and NEAS. The district court saw Cass and NEAS as providing "a single service—publicizing a national advertiser's product or service to the college market." The inevitable result of this view of the service is that the national advertiser is the "buyer" or consumer of the service, and the district court so found. Since the court also found that college newspapers, most of which are represented by NEAS, are in competition with other methods of advertising, such as poster

boards, television, direct mail, etc., it held that Cass had failed to prove that NEAS had the requisite market power in the relevant market consisting of "all modes of competition used to present national advertising to college students."

Although the district court correctly described the service provided by Cass and NEAS for the college newspapers at the outset of its opinion (see quotation, *supra* at 5-6), it ignored this service in making its relevant market determination. In exchange for a commission, Cass and NEAS offer to represent college newspapers in the solicitation of advertising from national companies. *Thus the college newspapers are "buyers" or consumers of Cass' and NEAS' services.*

NEAS and Cass are classic "middlemen," providing services to both the sellers (the college newspapers) and to the buyers (the national advertisers) by representing each seller's wares (an ability to reach a discrete portion of the college market with advertisements) to the buyers. As the district court opinion notes, neither individual buyers nor individual sellers in this market would likely be financially able to seek the other out, absent the services of a middleman. Thus a middleman in this market can have an economically feasible business because it represents numerous sellers to numerous buyers, thereby saving each newspaper and each national company the expense of arranging on a one-to-one basis the placement of advertisements. In contracting with such a representative, a school newspaper arranges for its "wares" to be displayed to a large number of national advertisers without mounting a campaign to contact each of them. Likewise, a national advertiser who buys space through such a representative may pick and choose from a large number of "minimarkets" without the expense of dealing individually with each newspaper that it selects.*

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* The district court details the reasons that make it efficient for both college newspapers and national advertisers to use a firm like Cass or NEAS. 374 F.Supp. at 797-798.

As the district court correctly observed, the relevant market may be determined by examining what products or services are reasonably interchangeable, from the purchaser's standpoint, with the product of service in question. See the discussion of *DuPont* and *Brown Shoe, supra* at 3. The district court held that national advertisers had significant alternatives to college newspapers for reaching the college market and, therefore, that NEAS was without the requisite market power in the relevant market.

In the context of a "middleman market" such as we have here, however, it may not be easy for a court to choose one of the "end" parties as the sole purchaser of the middleman's services. In this case, the national advertiser is the "ultimate puruchaser", that is, it buys page space from the college newspaper. This does not, however, directly control the determination of who is the purchaser of the middleman's services. For example, one can easily imagine a seller or group of sellers who provide a product at a fixed price to ultimate purchasers whether the purchasers are individually motivated to buy or are solicited by a sales representative to whom the seller pays a commission. In such a case, the ultimate purchaser, even though he buys through the solicitor, is clearly not the purchaser of the solicitor's services.

Technically at least, the services of Cass or NEAS are paid for by the college newspapers. The newpaper allows a certain portion of its charge for space to the advertisers to be retained by its sales representative as a commission on the sale.[7] In most middleman market cases, determining who actually pays the middleman will significantly aid the

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[7] The district court described a typical transaction as follows:

> A typical payment process for a $100 advertisement placed through an agency would be as follows. The ad is submitted by the advertiser or its agency to the college newspapers designated by the advertiser. Each

court in determining who is the actual purchaser of the middleman's services.

It is conceivable that both end parties in a middleman market could be purchasers of the middleman's services. In such cases, two relevant market determinations might be necessary. For example, if this case were viewed as a dual purchaser case, the district court's opinion would represent a finding that NEAS has no market power with respect to its national advertiser customers. The question would remain open whether NEAS has market power among the other purchasers of its services, college newspapers seeking national advertising. It would therefore be possible for a middleman to lack the requisite market power in one direction while achieving a complete stranglehold in the other direction.

The esteemed district judge erred by considering the national advertisers as the sole consumers or purchasers of NEAS' services upon whose alternatives the relevant market determination was focused. As the district court found, a college newspaper representative begins its business by acquiring a relationship for representation with college newspapers. Apparently NEAS does not ask

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[7] (Continued)

> newspaper runs the ad and returns "tear sheets" to the representative to confirm the printing, together with a bill. The representative checks the copy to verify that the ad was correct with regard to size, appearance, etc. The advertising agency is then billed $100, and, in turn, bills its client $100. Of the $100 paid to its agency by the advertiser, the agency receives a commission of 15% plus 2% of the balance. Hence, the agency would retain $16.50 [sic] (15 plus 2% of $85, or $1.70), and would remit the $83.30 balance to the representative. Presently, NEAS and CASS take a 25% commission of this amount, or $20.83. Thus, the newspaper receives $62.47. 374 F.Supp. at 797-798, n.1.

national advertisers to sign contracts designating it as their exclusive purchasing representative as to college newspaper advertising. Rather, it seeks to acquire exclusive arrangements with the newspapers as the base from which it operates. Moreover, NEAS is actually paid on commission from the college newspapers for finding advertisers, rather than paid commissions by the advertisers over the offering price of the newspaper space purchased for finding college newspapers. The newspapers, therefore, are the actual purchasers of NEAS' and Cass' services. NEAS and Cass are sales representatives paid commissions by the newspapers for successfully soliciting advertisements from national companies.

Kansas City Star Co. v. *United States,* 240 F.2d 643 (8th Cir. 1957), certiorari denied, 354 U.S. 923, and *Huron Valley Publishing Co.* v. *Both Newspapers, Inc.,* 336 F.Supp. 659 (E.D.Mich. 1972), upon which the district court relied, are not applicable to the situation in this case. Both cases involve alleged monopolies of advertising media in a local market. They are therefore not factually analogous to a case like this one, involving the alleged possession of monopoly power in a service market, *i.e.,* the service of sales representative for college newspapers. The district court's reliance thereon was premised upon its view of the customers of the service in this case as the advertisers.

Having redefined the nature of the service in question in this appeal, it remains for this Court to ascertain if Cass adequately proved its definition of the relevant market. By applying the indicia set forth in *Brown Shoe* to the facts of this case, it becomes clear that the relevant market is "the market for representing college newspapers throughout the United States in the placement of national advertising."

One of the *Brown Shoe* indicia for a submarket is whether it has *"specialized vendors."* This record shows that national advertising representatives specialize by

medium. For example, it appears that commercial newspaper representatives do not handle college newspapers and vice versa. As the district court itself noted, each of the parties is "a single, specialized company" in performing its functions for college newspapers (374 F.Supp. at 798).

Another *Brown Shoe* test is whether there are "distinct customers." The customers of these parties are the college newspapers that accept national advertising. The court below understood that such newspapers "constitute a distinct communications medium" (374 F. Supp. at 801). Additionally, only national advertisers selling products with a high appeal to the college market will advertise in college newspapers.

Still another *Brown Shoe* submarket criterion is "industry or public recognition of the submarket as a separate economic entity." The court found that Cass' and NEAS' business permits advertisers "to deal with a single specialized company in placing their advertisements" (374 F. Supp. at 798). They use Cass and NEAS because it is inefficient to deal with each school. Similarly, the college newspapers must rely on these parties to solicit national advertising on their behalf. Indeed, the advertising industry recognizes the representation of college newspapers as a specialized and distinct business.

Brown Shoe also adverts to "distinct prices, sensitivity to price changes." There is evidence that in the past, NEAS has raised its commission charge to the college newspapers from 20% to 25%. NEAS told the newspapers that they could raise their prices to offset this rise in its commission without fear of loss of revenue and it appears that this was done. Thus, as the district court noted, the market in the direction of national advertisers may be price-inelastic. 374 F.Supp. at 802. It also may be inferred from his unilateral raise in commission that the purchase price to the newspapers of NEAS' services is price-inelastic as well. As the pricing activity related above may

show, since the college newspapers cannot practically assume the solicitation of national advertisers themselves and since other advertising representatives specialize by medium, college newspapers have little alternative to Cass or NEAS if they wish to secure national advertising. Cf. *Telex Corp.* v. *International Business Machines Corp.*, ... F.2d ..... (10th Cir. 1-24-75, slip opinion at 47-59).

The foregoing facts, all reflecting salient *Brown Shoe* criteria, show that the district court erred as a matter of law in not concluding that the service of representing college newspapers in the placement of national advertising was the relevant market.

Cass also contends on appeal that the district court's finding that NEAS lacked market power in the relevant market is not dispositive of its allegations that NEAS' exclusive agreements and alleged anti-competitive activities were independent violations of Section 1 of the Sherman Act. *Because the district court on remand will reexamine NEAS' status in light of the relevant market as defined herein, this Court need not decide this issue.* It will again be before the district court on remand.

Because of the error in delineating the relevant market, this case must be returned to the district court for further proceedings consistent herewith.[8]

REVERSED AND REMANDED.

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[8] The district court has already supervised a great deal of discovery between the parties and has heard all the testimony in the case, so that it would delay this litigation to apply Circuit Rule 23. Nor is there evidence of bias that would affect the outcome of this case on remand. Accordingly, Rule 23 shall not apply.

APPENDIX B

OPINION OF THE DISTRICT COURT

MEMORANDUM OPINION

Plaintiff, CASS Student Advertising Incorporated ("CASS"), has brought a three-count complaint against National Educational Advertising Services, Inc. ("NEAS"), for violations of the Sherman Act. 15 U.S.C. §1 *et seq.* Count I alleges that "NEAS unlawfully possesses monopoly power in the relevant market and has unlawfully and wilfully acquired and maintained that power with the intent to monopolize the relevant market and with the intent to exclude CASS or any other competitor from the market" in violation of section 2 of the Sherman Act. 15 U.S.C. §2. In Count II, NEAS is charged with attempting to monopolize the relevant market, also in contravention of section 2. Count III alleges that the contractual arrangements between NEAS and hundreds of college newpapers, by which NEAS has undertaken to act as exclusive national advertising representative for the papers, constitute agreements in restraint of trade in violation of section 1 of the Sherman Act. 15 U.S.C. §1. Plaintiff seeks various forms of declaratory and injunctive relief, and treble damages. The complaint defines the relevant market as "the market for representing college newspapers throughout the United States in the placement of national advertising."

This action was filed on October 31, 1973, together with a motion for a preliminary injunction. Thereafter, the parties undertook extensive and intense discovery, culminating in a three-day hearing in December on the motion for preliminary injunction. At the conclusion of the hearing, and on the court's suggestion, both parties agreed that the evidence then before the court would be considered as evidence in the final hearing, and submitted the case on that evidence for a decision on the merits. See Rule 65 (a) (2), F.R.Civ.P. After a careful review of the evi-

dence and the law, the court is of the opinion that judgment should be rendered for the defendant. Plaintiff has failed to demonstrate by a preponderance of the evidence that the market alleged in the complaint constitutes a relevant market for purposes of the Sherman Act. This memorandum opinion will constitute the court's findings of fact and conclusions of law for this case pursuant to Rule 52 (a) of the Federal Rules of Civil Procedure.

I. Description of the Business of a Representative for Placement of National Advertising.

The plaintiff and the defendant are both engaged in the business of representing college newspapers for the placement of national advertising. So far as the evidence indicates, the parties are, in effect, the only serious contenders in this field. The operation of this business can best be viewed as comprised of two aspects.

At the first stage, the company seeking to establish itself in the business solicits college newspapers to receive authorization to represent them to national advertisers. Because of a lack of staff, financial and other resources with which to solicit national advertisers on their own, most college newspapers which run national advertisements accept the services of a representative.

Upon acceptance by a newspaper, the second aspect of the representative's operation comes into play—the representative becomes an advertising space salesman for the college papers. The representative periodically publishes a "ratebook" listing information concerning the college papers it represents and distributes this to national advertisers or their advertising agencies. This booklet contain figures on line rates and circulation of the papers, enrollment of the schools, order instructions, and other pertinent data. Through this booklet, the representative solicits national advertisers, either directly or through their agencies, in an attempt to sell them on the college newspaper medium, or, at least the papers it represents, as a viable mode of publicizing their products or services.

The representative handles all details of the placement of the advertisements in each paper, including submission of advertising copy, confirmation, and billing. Although his advertisement may appear in a number of college papers, the advertiser receives only one bill from the representative setting forth the total amount due to all the schools designated by the advertiser as recipients of his ads.[1]

II. The Parties

A. CASS

CASS is a Florida corporation licensed to do business in Illinois, and maintains its principal place of business in Chicago. It also has offices in Los Angeles and New York City. In January, 1969, Messrs. Alan Weisman and Steven Zeinfeld founded a partnership called College Advertising Sales and Service in which they were equal partners. At that time, the business was primarily involved with representing Chicago-area college and high school newspapers for the placement of local advertising. In April, 1970, the business was incorporated in Florida as CASS Advertising Inc. Mssrs. Weisman and Zeinfeld own 50% of the stock in the corporation. In October, 1973, the name of the company was changed to its present designation.

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[1] A typical payment process for a $100 advertisement placed through an agency would be as follows: The ad is submitted by the advertiser or its agency to the representative which sends it to the college newspapers designated by the advertiser. Each newspaper runs the ad and returns "tear sheets" to the representative to confirm the printing, together with a bill. The representative checks the copy to verify that the ad was correct with regard to size, appearance, etc. The advertising agency is then billed $100, and, in turn, bills its client $100. Of the $100 paid to its agency by the advertiser, the agency receives a commission of 15% plus 2% of the balance. Hence, the agency would retain $16.60 ($15 plus 2% of $85, or $1.70), and would remit the $83.30 balance to the representative. Presently, NEAS and CASS take a 25% commission of this amount, or $20.83. Thus, the newspaper receives $62.47.

During 1970, CASS decided to broaden its business to include representation of college newspapers throughout the country for the placement of national advertising. The complaint alleges that these efforts have been largely unsuccessful due to the position and practices of NEAS in the market, and specifically charges that the exclusive agreements which defendant has entered into with hundreds of college newspapers have caused the vast majority of those publications to refuse to deal with CASS. Plaintiff claims that total annual billings for national advertising in college newspapers are approximately $3 million, of which CASS receives only $50,000.

B. NEAS

The defendant is a New York corporation with its principal place of business in that state. It is licensed to do business in Illinois and maintains offices in Chicago, Los Angeles and San Francisco.

For approximately forty years, the predecessor to NEAS was the only business which represented college newspapers for the placement of national advertising. In March, 1966, Readers Digest Sales and Service, Inc., purchased the company and operated it as a division under the name National Educational Advertising Services. On December 1, 1970, the division was purchased from Readers Digest by the present owners,[2] who were all employees of Readers Digest responsible for the operation of the division. At the time of the purchase, the liabilities of NEAS exceeded its assets. Evidently, the purchase took the form of a transfer of the business assets from Readers Digest and assumption of a portion of the liabilities by the new owners; no cash changed hands.

Among the assets transferred were the rights to exclusive agreements which the company had with approximately 900 college newspapers throughout the country, designating NEAS as the exclusive representative of

[2] The present owner are Messrs. Joseph E. Hanson, Jr., Henry P. Dain, Richard Boylhart, and John O'Keefe. Mr. Hanson, President of NEAS, testified extensively for the defendant.

the papers for the placement of national advertising. In addition, the company had a number of oral agreements with papers under which NEAS acted as a non-exclusive representative. At the time of the hearing in this case, NEAS had written or oral argreements with 1103 college newspapers. Of these, 893 or 894 were identical written contracts designating NEAS as exclusive representative;[3] 7 or 8 non-exclusive written agreements; and 202 or 203 non-exclusive oral understandings. The 1973-74 NEAS "Directory" claims that the company represents 1070 college newspapers.

The Directory also claims that the enrollment at colleges which have newspapers represented by NEAS is 7,163,734 which "represents 84.3% of the current 8,500,000 college market," although other evidence indicates that the registration at the institutions is 8,177,761, thus giving advertisers access to 87% of the student population through NEAS.[4]

The parties agree that the 100 schools with the largest student enrollment represent about one-third of all college students. Virtually all of the college newspapers at those institutions have exclusive arrangements with NEAS.[5]

[3] The exclusive provision relates only to other college newspaper representatives. The paper or publication is free to accept advertising directly from a national advertiser or an advertising agency for the national company.

[4] Mr. Hanson claimed at trial that the most up-to-date figures from the U. S. Department of Health, Education and Welfare show a college enrollment of 9,400,000. There was no evidence, however, as to the number of these students who attended schools with papers represented by NEAS.

[5] Unless a national advertiser has a specific reason to reach smaller schools, it is more economical for the company to place advertisements in large college or university papers as the line rates do not vary directly with enrollment. Thus, the size of a school is a major consideration of national advertisers in deciding to place ads in college papers.

The business of NEAS consists almost entirely of representing college newspapers in the placement of national advertising. Although the defendant also represents high school newspapers for the placement of national advertising and has recently established a college radio division, the revenues generated by these ventures are insignificant.

III. The Relevant Line of Commerce

Section 1 of the Sherman Act prohibits "every contract, combination . . . or conspiracy, in restraint of trade or commerce," 15 U.S.C. §1, while section 2 declares it illegal for any person to "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several states. . . ." 15 U.S.C. §2. Before it can be determined whether there has been a contract, combination, or conspiracy in restraint of trade, or monopolization or an attempt to monopolize, the court must define the relevant market, both in terms of product or services, and geography. *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966); *Walker Process Equipment, Inc.* v. *Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965); *International Boxing Club* v. *United States*, 358 U.S. 242 (1959); *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956); *Bendix Corp.* v. *Balax, Inc.*, 471 F.2d 149 (7th Cir. 1972); *American Aloe Corp.* v. *Aloe Creme Corp.*, 420 F.2d 1248 (7th Cir.), *cert. denied*, 398 U.S. 929, *reh. denied*, 400 U.S. 856 (1970). Without such a delineation of the proper market, there is no reference by which to measure a company's ability to lessen competition, control prices, or exclude competitors. *Walker Process Equipment, Inc.* v. *Food Mach. & Chem. Corp.*, *supra* at 177. See *United States* v. *General Dynamics Corp.*, 42 U.S.L.W. 4368 (U.S., March 19, 1974).

The burden on this issue is upon the plaintiff. It must establish by a preponderance of the evidence that the alleged market is cognizable under the Sherman Act. Both parties agree that the geographic market is nationwide. The critical dispute concerns the service or product market. Thus, the question is whether the business of

representing college newspapers for the placement of national advertising is a type of service that constitutes a relevant market such that domination thereof makes out a "part" of commerce within the meaning of the Sherman Act.

In determining the relevant market for Sherman Act purposes, the Supreme Court has cautioned that "no more definite rule can be declared than that commodities [or services] reasonably interchangeable by consumers for the same purpose make up that 'part of trade or commerce,' monopolization of which may be illegal." *United States* v. *E. I. duPont de Nemours & Co., supra* at 395. This "reasonable interchangeability" standard was reaffirmed in *Brown Shoe Co.* v. *U.S.*, 370 U.S. 294 (1962), where the Court also noted the possibility for the existence of "submarkets":

> "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. . . . The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.* at 325 (footnotes and citation omitted).[6]

The court's objective is to arrive at a "sensible market analysis or market definition" which "delineate[s] mar-

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[6] Although *Brown Shoe* arose under section 7 of the Clayton Act, 15 U.S.C. §18, the Supreme Court, *in dicta*, has equated the Clayton Act's "line" of commerce with the Sherman Act's "part" of commerce. *United States* v. *Grinnell Corp., supra* at 572-73. Furthermore, the Seventh Circuit has noted the propriety of applying section 7 submarket analysis to section 2 cases. See *L. G. Balfour Co.* v. *F.T.C.*, 442 F.2d 1, 11 (7th Cir. 1971).

kets which conform to areas of effective competition and to the realities of competitive practice." *L. G. Balfour Co.* v. *F.T.C.*, 442 F.2d 1, 11 (7th Cir. 1971). See *United States* v. *Grinnell Corp., supra* at 572, 576.[7] The court must be wary of falling into the temptation of tailoring the market to the dimensions of the defendant's business. *Id.* at 590 (Fortas, J., dissenting). Thus, the market should include all services which, in light of the characteristics set forth in *Brown Shoe, supra,* are in realistic rivalry for all or part of the business of presenting national advertising to the college campus. This is an ad hoc determination, "essentially a question of fact." ABA, *Antitrust Developments 1955-1968* 25 (1968). See *Walker Process Equipment, Inc.* v. *Food Mach. & Chem. Corp., supra* at 178. So, in this case, the court must not be reluctant to include within the relevant market a number of different media or publications, and their advertising representative services, if the record reveals that the combination reflects commercial realities. *United States* v. *Grinnell Corp., supra* at 572.

Both parties presented testimony that college students comprise a distinct market for goods and services. They represent about one-third of the 18-24 age group. They have substantially different interests, and, in many cases, live in different environments and have different life styles from their non-collegiate peers. Generally, the students have a broader and more critical range of tastes and will spend more than people their age who are not in school.

Nor is there dispute that college newspapers constitute a distinct communications medium. The evidence strongly suggests that a higher percentage of college student read their college newspapers than any other publication,[8]

[7] As my colleague, Chief Judge Edwin Robson has recently stated, "the product market must be drawn broadly enough to include competition as it exists." *United States* v. *General Dynamics Corp.*, 341 F.Supp. 534, 555 (N.D.Ill. 1972), *aff'd* 42 U.S.L.W. 4368 (U.S., March 19, 1974).

[8] There was evidence, however, that approximately the same percentage of college students read local commercial daily newspapers as read their college papers.

and NEAS claims that the school papers are "the most realiable and effective medium to use" to reach the college market.

But these facts do not necessitate the conclusion that college newspapers or, rather, their representation throughout the country in the placement of national advertising, comprise a relevant market for Sherman Act purposes. This case involves a single service—publicizing a national advertiser's product or service to the college market. And the evidence indicates that, in this effort, college newspapers are in direct competition with a number of other communication methods.

The attitude of national advertisers toward college newspapers vis-a-vis other advertising media was illustrated by the testimony of Mr. Philip Murtaugh, a long-time employee of a national advertising agency.[9] In recently exploring the opportunities for promoting a client's product to the college market, he testified that a broad range of media was considered, including television, AM and FM radio, commercial newspapers, magazines such as *Playboy, Penthouse, Oui* and *Sports Illustrated,* the college editions of *Time* and *Newsweek* magazines, other college publications, and billboards. Thus, although the advertising industry considers college newspapers to be a separate avenue of communication, it also considers them to be in competition with other publications and other media. Other evidence, including testimony from Mr. Weisman, demonstrates that direct mail advertisements, posters located on campus, student directory ads, adver-

[9] The attitudes of the national companies on this issue must be examined, for, as the Seventh Circuit has noted, "any test 'which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful.'" *L. G. Balfour Co.* v. *F.T.C., supra* at 11, quoting *United States* v. *Bethlehem Steel Corp.*, 168 F.Supp. 576 (S.D.N.Y. 1958). At this stage of the analysis, the buyers are the national advertisers; they are purchasing the advertising space offered by the college papers.

tising samples distributed on campus, commercial magazines distributed predominantly on campus, and "Beetleboards"[10] are all modes of reaching the college market and are used by some national companies who also advertise in college newspapers. In fact, a document entitled "ADVANTAGES OF USING CASS," set to national advertisers or their advertising agencies, states in part:

> "[CASS] can help compliment your newspaper advertising through our affiliations with college radio representatives, poster placement representatives, student directory advertising representatives, sampling representatives, and direct mail representatives."[11]

Significantly, even college newspapers feel that they are under competitive pressure from other sources. Rather than deeming themselves the exclusive medium by which national companies can reach the campus, the newspapers consider themselves to be in competition with many of the aforementioned advertising modes.

Thus, it can reasonably be concluded that, from the viewpoint of the industries involved, the national advertisers and the school papers, plaintiff's alleged market is not a relevant market or submarket.

No evidence was presented to differentiate the parties' business from those enterprises which attempt to sell advertising space in other publications or media. On the contrary, testimony for the defense by an employee of a commercial newspaper representative established that the functions performed by advertising representatives for

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[10] A Beetleboard is a comparatively new method of advertising in which the entire body of a Volkswagen is painted with a promotion of a given product.

[11] During cross-examination, Mr. Weisman admitted that the communication methods mentioned in that flyer are means of reaching college students, and that national advertisers can and do use these services.

commercial daily newspapers are "interchangeable" with the operations of representatives for other media. And Mr. Hanson stated that he was "doing the same thing selling space in college newspapers as [he] was [when he was working] on the Ladies' Home Journal" as an advertising salesman. Thus, neither CASS nor NEAS can be deemed a "specialized vendor," *Brown Shoe Co.* v. *U.S., supra,* performing peculiar functions.

Although, with the possible exception of commercial dailies, many more college students read their college papers than read any other publication or watch television, there is no reason to conclude that that percentage is not matched by students who read a combination of other publications. Approximately the same percentage of students listen to radio as read their college newspapers. National advertisers apparently attribute minimal import to the great readership of college papers on campus because approximately only 20 of the top 100 firms, in terms of dollars spent on advertising, include college papers in their advertising campaigns. College newspapers apparently do not suffice for any national advertiser as the sole means to reach the college market. Although, as plaintiff asserts, college papers may be the only *newspapers* whose circulation is limited to the campus community,[12] they are not the only *publications* so limited. And many college papers report news generated off-campus, such as current national and international events.

The fact that national advertisers' use of college newspapers may be price-inelastic, as testified to by plaintiff's expert, is not sufficient to overcome the foregoing multitude of very real competitive relationships.

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[12] A number of newspapers of the larger universities, such as the *Michigan State Journal,* are distributed regularly into the general community.

Since "[t]he varying circumstances [and evidence] of each case determine the result," *United States* v. *E. I. duPont de Nemours & Co., supra* at 395, any apparently conflicting definition of relevant market found in the opinions of other courts is not conclusive or binding upon this court. The sole judicial obligation is to appraise the particular evidence presented and to give due regard to analogous cases.

To support its market definition, plaintiff relies upon *Kansas City Star Co.* v. *United States,* 240 F.2d 643 (8th Cir.), *cert. denied,* 354 U.S. 923 (1957). In that case, defendants were indicted under section 2 for attempting to monopolize and monopolization of interstate trade and commerce in the dissemination of news and advertising in newspapers and on radio and television stations in metropolitan Kansas City. The Kansas City Star Company published the two leading daily newspapers and owned a radio and television station. On appeal from conviction, the Company maintained that it was in direct and vigorous competition with other mass media in disseminating news and advertising. In particular, defendant claimed "that it received competition from radio and television stations, magazines, both monthly and weekly, newsreels, topical books, etc." 240 F.2d at 659.

After noting the "reasonable interchangeability" test of the *duPont* case, the court concluded that neither

> "radio stations [nor] television stations located outside the metropolitan area herein described, magazines, newsreels, topical books, specialty publications, etc., are 'market alternatives' or effective substitutes . . . ." *Id.*

Nonetheless, the court affirmed the trial judge's instructions which allowed the jury to consider "the existence of a wide range of competing media to determine if The Star was in a monopolistic position." *Id.* at 660.[13]

[13] The trial judge's instructions were characterized as "eminently fair" by the appellate court. 240 F.2d at 660.

> "From these instructions, it is quite clear that the jurors could have considered as sizeable competitors those which the court thought were not, and that other media with a small field of circulation compared to that of the Star, were actually a bar to monopoly." *Id.*

Similar to the Government in *Kansas City Star,* plaintiff here was accorded the opportunity to demonstrate lack of real and effective competition between college newspapers and other communication methods with respect to national advertising. But, unlike the court in that case, this court, as factfinder, has concluded that plaintiff has not sufficiently carried its burden on this point.

A similar conclusion was reached by the court in *Huron Valley Publishing Co.* v. *Booth Newspapers, Inc.,* 336 F.Supp. 659 (E.D.Mich. 1972). There, plaintiff sought a preliminary injunction prohibiting Booth's imminent publication of a free weekly newspaper, arguing that such action, considered in light of defendant's entrenched position in the publishing industry in the area, would constitute an attempt to monopolize the advertising market. *Id.* at 660-61. The court denied the injunction, rejecting plaintiff's product market definition as follows:

> "For the purpose of this decision, the court cannot agree with plaintiff's contention that the relevant market must be limited to newspaper advertising alone. All advertising performs the same function of introducing and maintaining public awareness of the retailer's product. While some forms of advertising may be preferable to others because of cost, effectiveness or other factors, it is impossible to assume that an advertiser is sensitive to price changes in the newspaper advertising market alone." *Id.* at 662.

IV. Conclusion

In sum, the record indicates that the plaintiff and defendant are in very real rivalry with other publications and media and their representatives for all or part of the national advertising dollars directed toward the college market. Plaintiff has not made out a sufficiently persuasive case for fragmentizing this competition. Economic and commercial realities do not support the conclusion that the market for representing college newspapers for the placement of national advertising is a "separate, identifiable market," *International Boxing Club* v. *United States, supra* at 250, or submarket.

Thus, the court has determined that the relevant market must be defined to embrace all modes of competition used to present national advertising to college students. Since no evidence was offered to show defendant's possession of monopoly power in that market,[14] there is no basis upon which the court can reasonably conclude that defendant has violated the antitrust laws.

Accordingly, it is ordered that judgment be, and hereby is, entered for the defendant, and that the complaint be, and hereby is, dismissed.

Enter:

/s/ Bernard M. Decker
United States District Judge.

Dated: April 15, 1974.

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[14] On the contrary, the record indicates that national advertisers spend minimal amounts, both in absolute and relative terms, to publicize their products in college newspapers.

APPENDIX C

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

Chicago, Illinois 60604
May 23, 1975
Before

Hon. Tom C. Clark, *Associate Justice* (Retired)*
Hon Walter J. Cummings, *Circuit Judge*
Hon. Philip W. Tone, *Circuit Judge*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed and Remanded, with costs, in accordance with the opinion of this court filed this date.

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* Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

Chicago, Illinois 60604
July 8, 1975
Before

Hon. Tom C. Clark, *Associate Justice* (Retired)*
Hon. Walter J. Cummings, *Circuit Judge*
Hon. Philip W. Tone, *Circuit Judge*

ORDER

On consideration of the petition of the appellee, National Educational Advertising Service, Inc., for a rehearing by the Court in the above-entitled appeal, and no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

It Is Ordered that the petition of the appellee for a rehearing in the above-entitled appeal be, and the same is hereby denied.

* Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

APPENDIX E

Statutory Provisions Involved

Section 1 of the Sherman Act 15 U.S.C. § 1

Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof,

shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act 15 U.S.C. § 2
Monopolizing trade a misdeameanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Rule 52(a) of the Federal Rules of Civil Procedure
Findings By The Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Supreme Court, U. S.
FILED
OCT 24 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-480

NATIONAL EDUCATIONAL ADVERTISING SERVICES, INC.,

Petitioner,

vs.

CASS STUDENT ADVERTISING INCORPORATED,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 516 F. 2d 1092. Otherwise, Opinions Below, Jurisdiction and Statutes Involved are as stated in the Petition.

QUESTION PRESENTED FOR REVIEW

The questions presented for review in the Petition are inaccurate. The sole question which could properly be presented for review is:

> Whether the Court of Appeals applied the proper legal standards to essentially uncontroverted facts in defining the relevant market to be "the service of representing college newspapers in the placement of national advertising"?

STATEMENT OF THE CASE

The relevant facts and proceedings below are fairly summarized in the Opinion of the Court of Appeals, appended to the Petition at pages 1a-16a, reported at 516 F. 2d 1092, and in the Opinion of the District Court, appended to the Petition at pages 1b-14b. reported at 374 F. Supp. 796. The Statement of the Case in the Petition contains numerous misstatements of facts, misrepresentations of the record, and unwarranted argumentation, most of which are not germane to the question presented for review. As recognized by both Courts below and admitted by the Petitioner itself in its Brief to the Court of Appeals (Brief of Defendant-Appellee, p. 27), the evidence in the record relating to the determination of the relevant market issue is essentially uncontroverted.

Without belaboring or refuting Petitioner's misstatements in detail, the record provides no support for Petitioner's irrelevant and all inclusive assertions that "the advertising representative, whether for college newspapers, metropolitan dailies or broadcast media works on an exclusive basis" (Petition p. 3) and "[i]n college newspapers carrying both local and national advertising, most advertising is local advertising" (Petition, p. 3). It is not true that Respondent had exclusive contracts with all or even a significant number of Chicago-area high school and college newspapers for the placement of local advertising. Respondent's statement carefully overlooks a key finding of the Court of Appeals that:

> ". . . since the college newspapers cannot practically assume the solicitation of national advertisers themselves *and since other advertising representatives specialize by medium*, college newspapers have little alternative to CASS or NEAS if they wish to secure national advertising. Cf. *Telex Corp.* v. *International Business Machines Corp.*, . . . F. 2d . . . (10th Cir. 1-24-75, slip opinion at 47-59)." (emphasis added) (Petition, p. 16a.)

REASONS WHY THE WRIT SHOULD BE DENIED

A. The Case Turns Wholly Upon Application of Well Established Legal Standards to Uncontroverted Facts and Presents No Special or Important Questions

The Petition is plainly insubstantial and presents no special or important reasons for considering it. Petitioner does not suggest that the Court of Appeals announced new or novel legal standards for determining the relevant market, which are in conflict with those well established by this Court. Indeed, Petitioner concedes that the Court of Appeals made its decision based upon an application of the controlling legal standards established by *United States* v. *E. I. DuPont de Nemours & Co.*, 351 U. S. 377 (1956) and *Brown Shoe Company* v. *United States*, 370 U. S. 294 (1962).

Petitioner seeks review because it disputes the Court of Appeals' *application* of those standards to the instant facts. In addition, inconsistently with its agreement before the Court of Appeals that all essential facts were uncontroverted, it now argues that the Court of Appeals overruled the District Court's findings of fact in violation of Federal Rule 52(a).

Neither argument is well founded. However, even if it were assumed *arguendo* that the Court of Appeals erred in its application of the proper legal standards to the facts or reversed a finding of fact of the District Court, such errors would not be of sufficient magnitude to warrant the granting of the Writ.

The legal standards by which the relevant market issue should be determined are well settled by this Court's decisions in *DuPont, Brown Shoe* and more recently in *United States* v. *Grinnell Corp.*, 384 U. S. 563 (1966), *United States* v. *Phillipsburg National Bank*, 399 U. S. 350 (1970), and *United States* v. *Connecticut National Bank*, 418 U. S. 656 (1974). These decisions were recognized and applied by the Court of Appeals,

which was conscious of this Court's admonition in *DuPont* that relevant market determinations could be reversed only upon a showing

> "that erroneous legal tests were applied to essential findings of fact *or* that the findings themselves were 'clearly erroneous' within our rulings on Rule 52(a) of the Rules of Civil Procedure," (351 U. S. at 381) (emphasis added).

The Court of Appeals, in accord with that admonition, reversed based upon its conclusion that the District Court had "misapplied the appropriate legal standards" (Petition, p. 3a). The Court found it unnecessary to set aside the District Court's findings of fact under the "clearly erroneous" standard since the facts essential to the relevant market determination were uncontroverted.

The Court of Appeals' opinion analyzed the uncontroverted facts, measured them against the reasonable interchangeability standard of *DuPont*, and applied with precise detail the *Brown Shoe* submarket indicia, in reaching its conclusion.

This Court's relevant market standards do not focus upon an abstract theoretical judgment as to whether the market under review is "narrow" or "broad". What is critical is whether the service claimed to be the market is reasonably interchangeable, from the purchaser's standpoint, with other available services. As recognized by the Court of Appeals, the college newspapers, the purchasers of the service at issue here, have no reasonable alternative but to use the services of a representative specializing in college newspaper national advertising, due to the fact that advertising representatives specialize by medium. (Petition, pp. 15a.-16a.)*

* Petitioner's repeated reference to Mr. Hanson's earlier duties as a space salesman for the Ladies Home Journal (Petition, pp. 3, 18) are a perfect illustration of Petitioner's basic failure to understand the interchangeability test applied by the Court of Appeals. Just because every salesman performs the same physical tasks in selling his product is irrelevant to whether the service of selling a particular type of product is interchangeable with available substitutes for that service. The decisions of this Court and others have repeatedly recognized that neither similarity nor even identity of function creates reasonably interchangeable products or services within a relevant line of commerce. *E.g., United States* v. *Grinnell Corp.*, 384 U. S. 563, 573-576 (1966); *International Boxing Club, Inc.* v. *United States*, 358 U. S. 242, 249-251 (1959); *Marnell* v. *United Parcel Service of America*, 1971 Trade Cas. ¶ 73,761 at pp. 91,212-91,213 (N. D. Cal. 1971); *Credit Bureau Reports, Inc.* v. *Retail Credit Co.*, 358 F. Supp. 780, 790 (S. D. Tex. 1971), *aff'd.* 476 F. 2d 989 (5th Cir. 1973).

The District Court erroneously failed to focus on the service at issue, as required by *Grinnell* (384 U. S. at 573). Rather, it held the relevant market to include "all modes of competition used to present national advertising to college students" (Petition, p. 14b), which in its view included:

> "television, AM and FM radio, commercial newspapers, magazines such as *Playboy, Penthouse, Oui* and *Sports Illustrated,* the college editions of *Time* and *Newsweek* magazines, other college publications, and billboards . . . direct mail advertisments, posters located on campus, student directory ads, advertising samples distributed on campus, commercial magazines distributed predominantly on campus, and 'Beetleboards' . . ." (Petition, pp. 9b-10b).

Such a definition by its terms included virtually all national advertising to the public at large, rather than merely national advertising to college students since all national advertising to some degree reaches college students. By no reasonable basis could a market definition which included all national advertising be justified under the sub-market standards of *Brown Shoe*, given the undisputed facts of this case.

The Court of Appeals ruling here is yet another example of this Court's statement in *DuPont* that in relevant market cases, "[T]he varying circumstances of each case determine the result." (351 U. S. at 395.) Were the Court to grant the Writ, every losing party in a relevant market case would be equally justified in pressing a Petition for Certiorari on this issue. The geometric increase in cases prophesied by the Petition if the Writ is denied (Petition, p. 11), will surely be realized if the Petition is granted. This Court does not sit to review the

unique facts of individual cases. A decision by this Court on the relevant market appropriate to the facts at bar, would have no impact beyond the limits of this specific case.

B. The Reasons for Granting the Writ Stated in the Petition Present Questions Which Have No Basis in the Record

Point II of the Petition begs the question, in assuming that "college newspaper advertising" cannot be a relevant market. Such an argument misses the point of the Court of Appeals' decision, which properly focused on the service at issue as required by this Court's *Grinnell* decision. In doing so, the Court of Appeals properly reversed the District Court, which had failed to analyze whether that service was reasonably interchangeable with other services available to college newspapers to secure national advertising. The Court of Appeals properly concluded, upon a review of all uncontroverted facts, that there were no reasonable alternatives. The Petition attempts to confuse this Court into focusing on "college newspaper advertising" rather than upon the service at issue.

The supposed conflict (claimed in Point III of The Petition) of the decision below with the decisions of other Circuits is nonexistent. The Court below applied the same legal standards utilized by the cases cited by Petitioner. Each court applied these standards to the unique facts before it. No conflict between Circuits can exist when the only purported distinction between decisions is whether the market defined is "narrow" or "broad", a matter dictated solely by the facts of each case. The important point is that the standards utilized by all Circuits deciding the relevant market issue were those mandated by this Court's decisions.

The Petition attempts to categorize the relevant market found by the Court of Appeals to be "narrow". The relevant market found herein is no more narrow than that found in *Grinnell* which properly analyzed the cluster of services at

issue. What Petitioner is really saying is that the service at issue is a relatively small part of the nation's commerce and, therefore, not entitled to be dignified with classification as a relevant market. The short answer is that neither the Sherman Act nor this Court's decisions provide any basis for applying different standards to relevant lines of commerce based upon their size.

Finally, Point IV of the Petition is simply an effort, without saying so, to have this Court decide whether the Court of Appeals improperly overruled the District Court under Rule 52(a). This Court's function, respectfully, is not to review findings of fact, all the more so where both courts below and Petitioner have agreed that the essential facts are uncontroverted.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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No. 75-480

In the
Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL EDUCATIONAL ADVERTISING SERVICES, INC.,

Petitioner,

vs.

CASS STUDENT ADVERTISING, INC.,

Respondent.

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

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The Scheffer Press, Inc.—(312) 263-6850

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Respondent's brief, treating this small antitrust case as unworthy of Supreme Court review, overlooks the fact that it was the respondent who initially overrated the case by seeking antitrust remedies for alleged monopolization of the business of "representing college newspapers . . . in the placement of national advertising". The District Court, realizing from the evidence that this very small service occupation did not amount to a market of economic or antitrust significance, dismissed the case. On respondent's appeal, the Court of Appeals has overly magnified the case by portraying this minor service as part of an elaborate framework of economic theory resulting in the finding of a relevant market by the court of review. Yet this finding is not based on the

evidence or trial court findings, but on serious errors of fact and law. More importantly, the Court of Appeals' theory would make a monopolist of thousands of sales representatives in the vast field of distribution of goods, wares, and merchandise and would permit many minor commercial disputes to be converted into federal antitrust claims. Review by this Court, halting this error and the resulting confusion in its incipiency, is clearly within the standards for review stated in this Court's Rule 19(b).

The Court of Appeals' holding as matter of law that the solicitation of national advertising for college newspapers is not a readily interchangeable service (the controlling criterion for a relevant market under all the decisions) is unsound on its face. Anyone with an elementary understanding of college newspapers and national advertising can solicit one for the other. Neither capital, a patent, special expertness nor much organization is required. The concept of interchangeability is misunderstood by the Court of Appeals when it says that college newspapers cannot practically "assume" the solicitation of national advertisers themselves and have "little alternative" to respondent or petitioner in obtaining national advertising since other advertising representatives specialize by medium. This statement of the Court of Appeals is emphasized by respondent (p. 2) as the Court's "key finding" (as if it were a factual determination). The controlling consideration is not what has been or is being interchanged but the possibility of interchanging. That is the meaning of the suffix "-able" in the word "interchangeable." Treating the relevant market as solely a question of law, the Court of Appeals' holding should be reviewed and reversed.

But the Court of Appeals was also wrong in not holding that the District Court's relevant market determination, most concisely stated in several sentences quoted in a footnote[1], was a finding of fact that could not be reversed without demonstrating it to be clearly erroneous under Rule 52(a) of the Federal Rules of Civil Procedure. The District Court's factual conclusion was that economic and commercial realities do not support respondent-plaintiff's contention that the respondent and petitioner are specialized vendors or that the solicitation of national advertising for college newspapers is a separate market. Here the District Court, after hearing testimony of witnesses and much documentary evidence, drew factual inferences which, unless clearly erroneous, the Court of Appeals could not overturn. Respondent, though claiming repeatedly that the facts were uncontroverted, disputes (Brief, p. 4 n.) the testimony of a defense witness on the question of interchangeability. However, the most

[1] "Thus, it can reasonably be concluded that, *from the viewpoint of the industries involved*, the national advertisers and the school papers, plaintiff's alleged market is not a relevant market or submarket.

"No evidence was presented to differentiate the parties' business from those enterprises which attempt to sell advertising space in other purlications or media. On the contrary, testimony for the defense by an employee of a commercial newspaper representative *established that the functions performed by advertising representatives for commercial daily newspapers are 'interchangeable' with the operations of representatives for other media.* And Mr. Hanson stated that he was 'doing the same thing selling space in college newspapers as [he] was [when he was working] on the Ladies' Home Journal' as an advertising salesman. Thus, neither CASS nor NEAs can be deemed a 'specialized vendor,' *Brown Shoe Co.* v. *U.S., supra*, performing peculiar functions." (Pet. for Cert. pp. 10b-11b, emphasis added).

significant fact findings were factual inferences from evidence which are within the function of the finder of fact and not of the court of review[2], even though the facts are undisputed. The Court of Appeals, in the guise of legal analysis, has invaded the province of the District Court contrary to the mandate of Rule 52(a). As a precedent this holding would tend to increase the scope of antitrust coverage as a matter of law over much comparatively insignificant economic activity.

The respondent's brief does not undertake to defend the analysis in the Court of Appeals' opinion that apparently attempts to apply the terminology of theoretical economics to the solicitation of national advertising for college newspapers. We quote excerpts from the opinion (Pet. for Cert. pp. 11a-13a):

> "*. . . the college newspapers are 'buyers' or consumers of Cass' and NEAS' services.*
>
> "NEAS and Cass are classic 'middlemen,' providing services to both the sellers (the college newspapers) and to the buyers (the national advertisers) by representing each seller's wares (an ability to reach a discrete portion of the college market with advertisements) to the buyers. As the district court opinion notes, neither individual buyers nor individual sellers in this market would likely be financially able to seek the other out, absent the services of a middleman. Thus a middleman in this market can have an economically feasible business because it represents numerous sellers to numerous buyers. . . .
>
> "In the context of a 'middleman market' such as we have here, however, it may not be easy for a court to choose one of the 'end' parties as the sole purchaser of the middleman's services. In this case, the national advertiser is the 'ultimate purchaser', that is, it buys page space from the college newspaper. This does not, however, directly control the determination of who is the purchaser of the middleman's services. . . . In such a case, the ultimate purchaser, even though he buys through the solicitor, is clearly not the purchaser of the solicitor's services.
>
> "It is conceivable that both end parties in a middleman market could be purchasers of the middleman's services. In such cases, two relevant market determinations might be necessary."

Here the Court of Appeals, treating petitioner and respondent not as agents of the college newspapers they represent but as "middlemen", uses terms that could be applied to a very large group of sales representatives who distribute many kinds of commodities. This opinion would provide a framework of theoretical labels that could be used superficially to make a relevant market out of activity that, as a market or submarket, has little significance in economic fact and should have no antitrust significance. Further, while the Court of Appeals emphasizes the role of the middleman, the two components in the alleged relevant market are the college newspapers employing newspaper advertising representatives, and the national advertisers solicited by newspaper advertising representatives. No college newspaper or national advertiser is a party to this action and there is no evidence that they have been injured by the petitioner. The analysis by the Court of Appeals provides this Court with a justifiable reason for review.

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[1] (Continued)

". . . Economic and commercial realities do not support the conclusion that the market for representing college newspapers for the placement of national advertising is a 'separate identifiable market,' *International Boxing Club* v. *United States, supra* at 250, or submarket." (*Id.* 14b)

[2] In a pioneer Supreme Court case on Rule 52(a), this Court explained that the rule applies to "inferences drawn from documents or undisputed facts", *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 394 (1948). See later cases cited in 9 Wright and Miller, Federal Practice and Procedure, 747 n. 35 (1971).

CONCLUSION

This case, despite the slight proportions repeatedly emphasized by respondent, has acquired an important significance because the Court of Appeals' holding and opinion make an antitrust mountain out of a commercial molehill. The potential for much groundless federal litigation thereby created should be removed by this Court's exercise of its reviewing power.

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